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THE DIVORCE EVIL—ITS CAUSE.

Certain it is that humanity is becoming better. With all its faults, evil ways and its crime waves, humanity is better today than at any time in the past. Our teachers and preachers have more to say about love and good, and less to say about hatred. Our standard is always being pushed a little higher—slowly, very slowly, it it true, but it is being raised. The mills grind slowly, but they keep turning. The reactionaries who prate about the wonderful virtues of the ancients have less influence today than ever before. And this is well, for they speak without knowledge.

I am assuming, without knowing, that there is such a thing as a divorce evil. When a condition becomes prevalent, there are always those among us, worshippers of the past, who cry out against present-day evils. It is apparent, however, even to casual observation, that there are more divorces being sought and granted now than ever before. And there is always a cause for every condition. The trouble with us is that we are prone to look for the cause in a superficial way—on the surface, merely. On the other hand, if we go to the very foundation of the matter we find the cause to be so broad and general that we have accomplished nothing. For instance, we say, and truthfully, that this condition is due to ignorance, and that ignorance is lack of civilization. But that gives nothing from which we can reach an understanding of the situation.

Probably we mistake a symptom for the disease. This so-called evil is merely an outcropping, an incident of a general condition in the evolution of mankind, a mere stone in the highway along which humankind is marching on its way to civilization. It will be passed in the course of time, but in passing, it is necessary for us to deal with it in the best possible way. In doing this, let's take care that in our zeal we do not make a bad situation worse, or deal unkindly with those who have been unfortunate.

Autocratic rule, wherever found, is in the process of disintegration, and just now it is making rapid progress. This is true, in this country, in the home, as well as in politics and religion, When a human being is released from fetters he is apt to make license of liberty, and when he is partly released he strains with greater vigor and with less patience against the remaining ones. As the foreigner who comes to our shore often construes liberty as license, so the men and women of this country, finding themselves in a state of democracy, in their ignorance of the true meaning of the word, exercise an arrogant freedom, and run in advance of their qualifications. It is a condition with which they are not qualified to cope. It finds them with their barbaric instincts of selfishness uppermost, and without that element of consideration for others which the more highly civilized few in every walk of life have.

In England, the people acquired freedom and democracy rapidly. In this country more rapidly still. Hence, we may assume, without knowing, that there are more divorces in proportion to population in this country than in England. And here we have not the curbing influence of tradition. But, incidentally, no thoughtful person would want to trade the divorce evil for such tradition, with its retarding effect upon civilization.

The divorce evil (excuse the term) marks a point in the evolution of mankind. It will pass. Some of us of today may possibly live to see it enter its period of decline. But that is expecting much. It cannot be effectually met by legislation. It will gradually disappear as we grow in intelligence, as we move forward along the road of civilization.

B.

NOTES OF IMPORTANT DECISIONS.

ELEVATOR PURCHASING GRAIN FOR TRANSPORTATION TO ANOTHER STATE IS INTERSTATE COMMERCE.—The case of Lemke v. Farmers' Grain Company, 42 Sup. Ct. 244, holds that the business of a grain elevator consisting of purchasing grain from producers within the state generally, almost all of which was transported for resale in markets in another state, is interstate commerce, which the state has no right to burden, although purchase of the grain so purchased may be diverted to state destinations. The Court was construing the North Dakota Grain Grading and Inspection Act which governs the inspection, weighing and grading of grain, and permits purchasers of grain to be made only by those who hold licenses from the state and act under a system of grading, inspecting and weighing fully defined therein. The act also limits the profit the buyer can realize on his purchase. The Court held that as applied to the elevator concern in question the act is invalid. Further on this question we quote from the opinion as follows:

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle, Dahnke-Walker Milling Co. v. Bondurant, decided December 12, 1921, 256 U. S. ——, 42 Sup. Ct. 106, 66 L. Ed. ——. In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into Kentucky and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the state court, and held that the buying, no less than the selling of grain under such circumstances was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions."

RECENT DECISIONS IN THE BRITISH COURTS.

During the war there were a number of decisions which by use of such terms as "frustration of the venture" and "implied condition of capability of performance" extended very considerably the plea of impossibility as an excuse for performance of a contract. By a judgment just issued by the House of Lords, Matthey v. Curling, "The Times" of 22d March, the stricter rule of the common law appears to be replaced. Briefly the finding of the court was that where in a contract, other than one of personal service, there is an unrestricted covenant to perform a certain act, impossibility arising from any cause other than a statutory enactment rendering performance illegal is no excuse for non-performance. The appellant took a house on lease, covenanting to insure the premises against fire and to yield them up at the end of the term in good repair. The premises were requisitioned by the War Office, who insisted on the lessee quitting the premises. In February, 1919, while the War Office was in possession, the premises were destroyed by fire. The lease expired on March 25, 1919. The appellant claimed to be relieved (1) from the liability for rent for the last quarter, on the ground that he had been deprived from enjoyment by superior force; but it was held that such a defense would only hold good where the lessee was evicted by the landlord himself, or by someone having a title superior to that of the immediate lessor; (2) from the covenant to insure and to deliver up in good repair, since performance had become impossible without any fault of his own, and from circumstances against which

he could not provide. It was held, following Paradyne v. Jane, Aleyne 26, that since the impossibility did not arise from statute, it was no excuse for failure to perform the covenant.

Who has not seen or perhaps on occasion used the term, etc., to conclude a specification of items in some agreement? In Ambatielos v. Anton Jurgens Margarine Works, 38 T. L. R. 294, a contract in which the well known abbreviation occurred came before the court. The action was for demurrage, and the clause in the charterparty to be construed ran: "Should the vessel be detained (beyond 14 working days) by causes over which the charterers have no control—viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc.—no demurrage is to be charged." The steamer was, in fact, detained by a cause over which the charterers had no control, namely, a strike of dock laborers, and the charterers claimed to be exempted from demurrage under the clause, set out above. Had the words in parenthesis—from "viz." to "etc."—been omitted, clearly there would have been no liability, and the question for the Court was whether these words qualified and limited the general words, and, if so, how far? The rule of law as laid down by the House of Lords in Alexander v. Hansa 1920, A. C. 88, is that a charterer who has undertaken to load or unload within a certain number of days is answerable for the non-performance of the contract, whatever the nature of the impediments, unless they are clearly covered by the exceptions in the charterparty, or arise through the fault of the shipowner or his servants (see per Lord Wrenbury, at p. 100). In the case under consideration strikes were not expressly excepted, and unless the general words governed the whole clause, the charterer must find salvation in the etc. Mr. Justice McCardie held—and, we think, rightly—that he was obliged to read the clause as a whole; and, further, that the word *viz.*—which, it was pointed out is not the same as *e.g.*—limited the exception to the words in brackets. This, then, threw the charterer back to the etc. The learned judge was no doubt justified in acceding to the argument that etc. is an expression so vague as to be meaningless in a commercial document—that if parties will use such indefinite words they must not expect the courts to discover their meaning. Mr. Justice McCardie, however, did not stop there. He bravely applied himself to the task of giving a meaning to the meaningless, and, in effect, found that etc. meant "and other things of the same kind as those specifically mentioned." In other words he applied the well known *ejusdem generis* rule, and, applying it, held that strikes did not come within the exception.

Most large municipalities have clauses in their Acts entitling the citizens to some measure of compensation in the event of damage to their property from mobs. In this connection the recent case of Freeman v. The Receiver for Metropolitan Police District is worthy of special notice. As a writer in the Law Journal (to which we are indebted for the following summary of the case) and the authorities have well said, it exemplifies the difference between the legal and the popular meaning of a riot. The action was brought by the plaintiff, as lessee of an unoccupied house in Vauxhall, for damages because of its partial destruction in the Peace Celebrations of June 28, 1919, the grievance being that doors had been wrenched off, windows torn out, and partitions broken down to provide fuel for bonfires which had been lighted in the street and which caused crowds to assemble of so formidable a character that it was impossible to interfere with them. The police of the district did not, in fact, interfere, but it was generally agreed that the crowd was a jolly and good-humored one, and that the premises had long been regarded as derelict, people helping themselves at will to wood and other articles of fuel from it. The Receiver was sued under the Rent (Damages) Act, 1886, which gives a right to compensation out of the police rate of the district where a shop, house or building has been injured or destroyed "by any persons riotously and tumultuously assembled together;" and together with various technical defenses (which appear not to have been seriously argued) he denied that persons were riotuously or tumultuously assembled on the occasion referred to. The *criteria* for a "riot" were laid down once for all by the Divisional Court, after an examination of all the authorities in Field v. Metropolitan Police Receiver (1907), 76 L. J. K. B. 1015, where it was held that five elements were necessary: (1) A number of persons not less than three; (2) a common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another, by force if necessary, against any persons who might oppose them in the execution of the common purpose; and (5) force or violence not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. This decision has been applied quite recently by Mr. Justice Bailhache in the case

of Ford v. Receiver of Metropolitan Police (1921), 90 L. J. K. B. 929, where the learned judge, held, under similar circumstances to those in the present case, not only that Peace Celebrations might constitute a legal riot, but that the police authority was not entitled to demand from a claimant proofs of the evidence on which he relied for support of his claim (being himself in a better position to obtain information on the matter than the claimant would be), and that his refusal to act until supplied with such proofs was a refusal to fix compensation for which he might be sued under the Act. In the present case, after a hearing extending over two days, Mr. Justice Shearman, while expressing his regret that he had not had the assistance of a jury, who the Vauxhall district, found that "a common might possibly have known better than himself what was to be expected from people in purpose existed to resist all persons who might try to stop the crowd, and that the crowd behaved in such a manner as to cause ordinarily and reasonably courageous persons to keep out of the way." That constituted a riot, notwithstanding that the good-natured crowd was only out for the Peace celebration, and so the Receiver was ordered to pay the damages.

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THE THEORY OF THE PLEADINGS IN CODE STATES—PART I.*

The Situation at Common Law—At common law a party desiring to vindicate some legal right was required to diagnose his case, and state, not the facts of the particular transaction, but what he conceived the legal effect of those facts to be. A particular form of action was then adopted and at the trial the litigation was not merely concerning the substantive merits of the party's case, but also whether he had been correct in the diagnosis of his case. In this scheme rights did not determine one's remedies, which logically should be the case and was, to a great extent, in the later Roman law, in the time of the Jus Naturale, when profound changes had occurred in the strict law, under the influence of the praetor's edict and juristic writers.[1] But at common law the remedies, historically at least, were the criteria of the rights. At common law, it was largely forgotten that the adjective or procedural law was merely a means of obtaining or securing one's substantive rights. Lawyers and judges, living in an age of scholasticism and legal maxims, made the law an end, and sought to make the law logically and mathematically a thing in itself. Record worship resulted, so far as pleadings were concerned, and when it was proposed finally to allow amendment of pleadings, Baron Parke exclaimed in opposition, "Think of the state of the record!" The harmful practice of trying the record and not the whole case, on appeal, was both a concomitant and a result of this view of the adjective law.

The manifest injustice under the older system of pleading requiring the pleader to abide by his particular theory,[2] was only partially remedied by the device of amend-

*This article is reprinted from the California Law Review, with their permission and with the consent of the author, who is Dean of the University of Wyoming Law School. Part II will treat of the following: States Which Have Abandoned the Requirements of a Theory of the Pleadings; States Taking a Liberal View From the Beginning, and Summary and Conclusion.

(1) See Roscoe Pound, The Effect of Law as Developed in Legal Rules and Doctrines, 27 Harvard Law Review, 195 at p. 213 et seq.

(2) "If a wrong action was adopted, the error was fatal to the whole proceeding, however clearly the facts of the controversy might have been brought before the proper court. The plaintiff may have served his adversary in due time, and may have given as full information as to the material facts of the case as could be given in any other action; he may have proceeded openly and fairly in all matters; there may have been no question as to the substantial justice of his claim; but all this would not avail if his action was not technically the proper one. He must pay the costs and go out of court. If he chose, he could begin again, but under like conditions. At his peril he must select the appropriate formula. It was not enough that he stood within the temple of justice, he must have entered through a particular door. Or, to change the figure, chancery, the so-called officina justitiae, was like an armory. To it every man who would contend with another in the courts comes to choose his weapon. The choice is large. All the weapons of juridical warfare are here. But every weapon has its proper use, and can be put to no other. Moreover, only one weapon can be chosen at a time; and once chosen, it cannot be exchanged for a different weapon in the progress of the combat. If the fight is to go on, it must be with such a weapon as was first chosen, and according to its special rules. A sword being selected, the rules of sword play must be strictly followed. A crossbow may not be used as a mace. The issue of the combat must not be determined by brute force,—not even by the brute force of indisputable facts arrayed before the court. It is a contest of skill; success depends upon observing the formal rules of the combat." Hepburn, Development of Code Pleading, § 46; see also 50 L. R. A. (N. S.) 3. "Necessity of Theory of the Case in Pleading."

ment; for in the first place, the judge on circuit, drawing his authority to try the case from the words of the original writ, issued by the chancellor, had no authority to allow amendments; and later, when these were permitted, the general rule was that they could and must not introduce a new cause of action.[3]

It is remarkable that the old common law rule of requiring a definite theory of the pleadings, should have obtained as long as it did, although it is partly explicable from the belief held by lawyers and judges generally that the common law was synonymous with natural and eternal law itself, which could not be changed; and partly, perhaps, from the natural conservatism of the law, coupled with the further fact of the characteristic dislike of innovation on the part of Englishmen. However, it is still more remarkable that today, with sweeping changes being and having been effected in pleading, by the various codes and practice acts, adjective law as well as substantive law should still be regarded as something ideal, unchangeable, and eternal. As in the Mirror of Justices,[4] the author complains of the more rational innovations for settling disputes, instead of the older method of trial by battle, so today one hears echoes of high praise of the older forms of pleading.[5] Many judges, trained in the belief that the system in which they have been trained is equivalent to natural law and reason itself, look upon changes made in the rules of pleading as beyond legislative competence—a good example of the two views of law dominant in this country, the Historical and the Analytical; the one denying the efficacy of effort to change the law as it has been inherited, the other tending to believe that the law may be made by the mere legislative fiat, of "be it enacted." While there is undoubtedly truth in both views, neither exclusively contains all of it. But this glorification of the old system is not merely confined to the bench; members of the bar also revere certain phases of the older system of requiring a definite theory of the pleadings.[6]

The Advent of the Codes of Procedure—With the inauguration of the procedural

(3) De Graw v. Elmore (1872), 50 N. Y. 1; Steffy v. Carpenter (1860), 37 Penn. St. 41. A striking illustration of the rule, that the amendment must not introduce a new cause of action, is to be seen in the case of Allen v. Tuscarora Valley Ry. (1910), 229 Pa. 97, 78 Atl. 34. Plaintiff, injured while a brakeman on the defendant railway, alleged in an action of trespass that the defendant had negligently adopted and used the pin and link coupler, more dangerous than the usual and ordinary coupling apparatus employed by railroads. Then he desired to amend his complaint and sue on a federal statute which made it a violation of law not to use couplers coupling automatically by impact. Prior to this federal act, employees of common carriers assumed the risks and dangers naturally and ordinarily incident to their employment; but the federal statute relieved the employees from these risks when the carrier was engaged in interstate commerce, and placed them upon carriers. The court denied the motion for amendment, on the ground that it created a new cause of action, taking away from the defendant the defense of assumption of risk. Hence, though the facts entitling plaintiff to recover were at all times the same, no relief was granted. Cases reaching similar results are Breen v. Iowa Central Ry. Co. (1918), 184 Ia. 1200, 168 N. W. 901 (amendment refused which would be barred by the Statute of Limitations); Carpenter v. Central Vermont Ry. Co. (1919), 107 Atl. 569 (Vt.) (semble); Baltimore & O. R. R. Co. v. Branson (1917), 104 Atl. 356 (Md.).

Happily, a more liberal view appears to be gaining in some jurisdictions, illustrated in the following cases: Friederichsen v. Renard (1917), 247 U. S. 207, 62 L. Ed. 1074, 38 Sup. Ct. Rep. 450; Nash v. Minneapolis, etc., R. R. Co. (1918), 141 Minn. 148, 169 N. W. 540. On the whole matter, see Austin W. Scott, The Progress of the Law—Civil Procedure, 33 Harvard Law Review, 242.

(4) Chap. V. § 1. No. 19: "It is an abuse that justices drive a lawful man to put himself upon his country when he offers to defend himself against an approver by his body." No. 126: "It is an abuse that there is no trial by battle in personal actions as there is in case of felony."

(5) Cf. McFaul v. Ramsey (1857), 61 U. S. (20 How.), 523, 525, 15 L. Ed. 1010: "This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestion of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is bound to be beyond the power of legislative omnipotence. They cannot compel the human mind to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts." See to the same effect the language in Supervisors v. Decker (1872), 30 Wis. 624; Chicago, St. L. & P. R. Co. v. Bills (1885), 104 Ind. 13, 3 N. E. 611.

(6) Mr. D'Arcy, writing in 1910 in 70 Central Law Journal, 405, said: "It is to be observed, too, that some of our leaders of the bar are doing their best to eliminate pleadings, and substitute the Turkish method of transferring property. Some of our tribunals have succeeded in getting away from the 'technicalities' of pleadings, and have substituted the method of pleading for recovery of a horse and allowing the pleader to recover on his 'theory of the case' that what he really wants is not a horse, but a cow." To this it might be said that under the old system of pleading, requiring a definite theory of pleadings, not even a "cow" was given the party with a valid cause of action because he had improperly diagnosed his case—a flagrant injustice, indeed.

reform activities of David Dudley Field in New York, in 1846, it was hoped by many law reformers that a new era had been reached in the adjective law. Codes, following the ideas of Field, were soon to be found in many of the states. But the courts, interpreting the provisions of the codes as mere declaratory of the common law, and that the legislatures could not really change the "fundamental and eternal" differences between the various causes of actions, disappointed the hopes of the codifiers. The case of Barnes v. Quigley[7] is illustrative of this tendency of the courts. The plaintiff, endorsee of a promissory note made by the defendant, in his declaration alleged that defendant had fraudulently represented to plaintiff that he had given the note to the payees solely for their accommodation. The answer was a general denial. It was proved that the defendant was not fraudulent, but that he had not made the note by way of accommodation; therefore, the trial court taking a more liberal view, struck out the allegations of fraud and permitted recovery in assumpsit. But this decision was reversed by the upper court, the opinion stating, what has since become the customary method of dealing with such cases in states where a requirement of the theory of the pleadings obtains:

"The complaint is for fraud and not upon contract. Whether the facts constitute a cause of action is not material. The whole framework is in fraud . . . and it was an entire change of that cause and a surprise upon the defendant when this view was ignored by a counsel and court at the trial. . . . The two forms of action might require a very different defense."

Without pausing here to comment upon the merits of this decision, it is sufficient to point out that this case clearly lays down a definite "theory of the pleadings," which afterwards greatly influenced courts in other jurisdictions.

Codes based on the original New York code of procedure, have now been passed in a large number of states.[8] Our problelm is, from an inductive study of the reports of decisions in code states, (1) To ascertain what jurisdictions follow the less liberal construction of the provisions of the code, with reference to abolition of causes of actions; (2) What states once having followed it have since abandoned it; (3) What states never in any definite way followed the illiberal view of the pleadings; and lastly, (4) To submit a critique of the "theory of the pleadings" doctrine itself.

Where a Theory of the Pleadings is Required—The courts of New York have consistently followed the Barnes v. Quigley principle of requiring a definite theory of the pleadings, on which the complainant must try his case. In the fairly recent case of Jackson v. Strong,[9] an accounting was brought alleging the existence of a partnership. But the proof being insufficient, recovery was denied, even though the referee found the defendant liable for a certain amount, defendant admitting he had agreed to pay plaintiff a reasonable value for his services.[10]

(7) (1874), 59 N. Y. 265.

(8) Arizona, Arkansas, California, Colorado, Connecticut, Idaho (Constitution), Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana (Constitution), Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming. Generally, it may be said that these codes of procedure contain, with reference to the abolition of forms of actions, the following common provision: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished, and there is in this state but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action." Laws of Wisconsin, 1898, § 4286.

(9) (1917), 222 N. Y. 149, 118 N. E. 512.

(10) So also Deyo v. Hudson (1919), 226 N. Y. 685, 123 N. E. 851. Where the proceedings should have been in equity, recovery at law will be refused. Reubens v. Joel (1853), 13 N. Y. 488; Voorhis v. Child (1858), 17 N. Y. 354. And in De Graw v. Elmore (1872), 50 N. Y. 1, recovery was denied where the complaint was in tort and a cause of action proved on contract. The dissent by Mr. Justice Peckham takes the more liberal view. What effect the new Practice Act in New York may have, is too conjectural to be treated of here.

In Jackson v. Strong, supra, n. 9, the court in its opinion illustrates the tendency of the courts, prevalent at that time, to regard the common law adjective law as part of the jural order of nature itself. In part the opinion stated: "The inherent and fundamental differences between actions at law and suits in equity cannot be ignored. As has been said, pleadings and a distinct issue are essential to every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose." This view, that the law in which one has been trained and educated, is synonymous with universal and natural law, has been one of the obstacles toward procedural reform.

On the other hand, in the Appellate Division of the New York Supreme Court, a more liberal opinion has been expressed with reference to the theory of the pleadings. In Connor v. Philo[11] the complaint alleged breach of a contract of employment. Defendant as principal contractor and employer was to receive a certain compensation from the owner, and from the proceeds pay the plaintiff. Plaintiff alleged, besides breach of contract, fraudulent conversion of the funds by defendant. Although the plaintiff failed to prove the allegations of fraudulent conversion, the Appellate Division permitted recovery on the contract, treating the matters unproved as surplusage. So in Graham v. Graham[12] the Appellate Division permitted recovery for repairs in a case predicated upon specific performance, which was impossible because of the statute of frauds.

Massachusetts[13] appears to follow the requirements of a theory of the pleadings, as is shown by two recent cases. In Ash v. Childs Dining Hall Company,[14] an action of tort was brought alleging that the plaintiff had been injured by swallowing a tack in a piece of blueberry pie, which she had eaten in defendant's dining hall, and that the defendant had been negligent, which defendant denied. It was shown that the tack was very small and might easily be overlooked, and no negligence on the part of defendant was proved. The Supreme Judicial Court held it error not to have directed a verdict for the defendant; because the plaintiff having adopted the theory of negligence, must abide by it, even though as the Court intimates, there might be a good cause of action on a contract implied between the parties. And in fact, in a case[15] decided by the same Court on the very same day as the Ash case, recovery was permitted on practically a similar state of facts, but where plaintiff had sued on an implied warranty instead.[16] It will be noted that in the Ash case, the mere fact that plaintiff had made and failed to substantiate the allegations of negligence, prevented recovery, even though facts had been alleged and proved on which recovery should have been allowed; while in the Friend case, plaintiff omitted the allegations of negligence and on similar facts was granted recovery.

The courts of Indiana present, perhaps, the most striking example of the doctrine requiring a definite theory of the pleadings. In Oolitic Stone Company v. Ridge[17] the latter brought an action to recover damages for personal injuries sustained by him while in the employ of the Stone Company. The theory adopted by the Court and the parties was that this action was governed by subdivision 2 of § 1 of the Employers' Liability Act.[18] The Stone Company contended that the act was unconstitutional, in violation of the Fourteenth Amendment to the Federal Constitution. Ridge claimed that his declaration stated a good cause of action not only under the act, but also at common law, and that even if the act were held to be unconstitutional, this should not deny him recovery. The lower Court permitted plaintiff to recover on the view that the act was constitutional, but pending appeal by the Stone Company the upper Court declared the act unconstitutional. When, therefore, the Stone Company was given its hearing before the higher court, a re-

(11) (1907), 117 App. Div. (N. Y.) 349, 102 N. Y. Supp. 427.

(12) (1909), 134 App. Div. (N. Y.) 777, 119 N. Y. Supp. 1013.

(13) Massachusetts, of course, is not strictly a code state, but all forms of action have been abolished except Contract, Tort, and Replevin, Rev. Laws, Ch. 173, § 1.

(14) (1918), 231 Mass. 86, 120 N. E. 396.

(15) Friend v. Childs Dining Hall Co. (1918), 231 Mass. 65, 120 N. E. 407.

(16) In the Friend case, supra, the court said: "On principle and authority, it seems to us that the liability of the proprietor of an eating house to his guest for serving bad food rests on an implied term of the contract and does not sound exclusively in tort, although of course he may be held for negligence if that is proved. But in view of the fact that in Massachusetts the form of action to recover on an implied warranty may be tort or contract (Farrell v. Manhattan Market Co. (1908), 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436), the inconsistent results reached in the two dining-hall cases above, are all the more remarkable—but another example of the requirements of a theory of the pleadings.

(17) (1908), 169 Ind. 639, 83 N. E. (Ind.) 246.

(18) Acts of Indiana, 1893, ch. 130, p. 234.

versal in its favor was granted.[19] The reason given for the decision, besides the necessity of requiring a definite theory of the pleadings, was that it would be unjust to the adverse party and also to the Court to permit a party to assume a definite theory in the trial court and shift from it to another in the appellate tribunal.

The earlier case of Mescall v. Tully[20] had applied the doctrine of a definite theory of the pleadings even to suits in equity. There the Court said that the theory upon which the complaint was drawn was that a parol agreement transformed the deed from an absolute conveyance into an instrument creating a trust, and as this theory was overthrown by the authorities, the entire complaint was without foundation.[21] Also in the case of Neidefer v. Chastain[22] a plea of fraud having not been proved, was denied, even though other facts were alleged and proved showing that the articles sued for by plaintiff were worthless.[23]

The courts of Missouri, requiring a theory of the pleadings, also warrant separate consideration. In Rush v. Brown[24] the facts were such that relief could have been given either at law or in equity, but plaintiff having treated his suit as one for specific performance, had failed to substantiate the necessary elements under such a theory. The question was suggested whether the Court might treat it as an action at law, which the Court held could not be done.[25]

In Nave v. Dieckman[26] the complaint alleged that the plaintiff had been a tenant on defendant's farm, and it had been agreed that should any disputes arise, growing out of the tenancy, these should be left to arbitration. In a dispute arising concerning the number of acres of land cleared by the plaintiff, the arbitrators found that the plaintiff had kept and performed his obligations, and that as a result defendant owed plaintiff $110 for his services. At the trial, defendant denied the validity of this award, contending that he owed plaintiff only $60, inasmuch as not all the work had been completed by plaintiff. The trial Court, therefore, ignored the arbitration and award as a basis for recovery, and instructed the jury that, if they should find the defendant had agreed to pay plaintiff for clearing land and plaintiff had actually cleared some land, they should find for plaintiff for whatever sum was due. The upper Court held this instruction to be erroneous, because not founded on the theory advanced by the parties.[27]

(19) The court said: "It is an established rule of pleading that a complaint must proceed upon some definite theory and on that theory plaintiff must succeed or not succeed at al. As the theory adopted in the trial court was that this action was brought under * * * the Employers' Liabiltiy Act of 1893, that theory must be adhered to in the cause on appeal. As said Act is unconstitutional, so far as it applies to appellant, it follows the court below erred in overruling appellant's demurrer to the amended complaint." This is another example of injustice resulting from requiring a theory of the pleadings.

(20) (1883), 91 Ind. 96.

(21) The result would be that if one sued in equity on the theory of specific performance, but showed facts creating a trust, he would be denied relief and would have to begin his suit de novo.

(22) (1880), 71 Ind. 363, 36 Am. Rep. 198.

(23) So also Tibbet v. Zurbuch (1899), 22 Ind. App. 354, 52 N. E. 815. In this case, the court itself ventured a guess as to the theory meant to be set forth, and tried the case to see whether the theory had been correct or not. See also the following cases requiring the theory of the pleadings: Cleveland Ry. v. Dugan (1897), 18 Ind. App. 435, 48 N. E. 238; Dyer v. Woods (1906), 166 Ind. 44, 76 N. E. 624; Terre Haute, etc., Ry. v. McCorkle (1895), 140 Ind. 613, 40 N. E. 62; Aetna, etc., Co. v. Hildebrand (1894), 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194n. The requirements of a definite theory of the pleadings, on which plaintiff fails or succeeds, is apparently well settled in Indiana.

(24) (1890), 101 Mo. 586, 14 S. W. 735.

(25) In Rush v. Brown, supra, n. 24, the opinion stated: "It would be a departure from the true spirit of the Code to require of plaintiff 'a plain and concise statement of the facts constituting his cause of action,' without requiring (at some stage of the case) a plain statement of the judicial action demanded thereon, for the information of the defendant and of the court." The court here appears to be confusing the theory of the case with the theory of the pleadings—against the former, no objection can be made.

(26) (1919), 208 S. W. 273 (Mo.).

(27) In its opinion, the court said in part: "Plaintiff was allowed to recover * * * on the original contract without reference to the arbitration and award. * * * The cause of action intended to be presented and tried was founded on and to enforce the arbitration and award. So too, the plaintiff tried his case on this theory, putting the arbitration and award in evidence and showing his compliance therewith and no more. * * * It is elementary that plaintiff cannot sue and try his case on one cause of action and recover on another. Even if on the trial of one cause of action, the evidence shows that the plaintiff might recover on another and different cause, he cannot be allowed to do so in that case, either with or without amending his complaint." This extract from the opinion illustrates well the medieval view

As to courts in other states which require a definite theory of the pleadings, separate, intensive treatment of the cases is not possible, either because these are in confusion or because appropriate cases are not obtainable. Only brief mention can, therefore, be made of those states.

In the courts of Nebraska there are dicta which apparently approve the doctrine of the theory of the pleadings. In Omaha Electric Light & Power Company v. Butke[28] the action was to recover damages because of certain excavations made by the defendant in "wrongfully and negligently" removing the supports which adjoined a conduit owned by plaintiff, running lengthwise along an alleyway. Plaintiff requested the Court to charge the jury that a landowner had no right to go upon a public street or alley to make excavations for the purpose of erecting a building upon his own property, and that he should be liable for damages caused upon the surface or beneath the surface of the street. Defendants contended that such instruction should be refused, as it would permit a recovery for a trespass in the alley, on a theory based on negligence. But plaintiff maintained that his petition stated a cause of action for both negligence and trespass. This the Court denied and refused plaintiff recovery, saying that inasmuch as plaintiff had adopted a theory of negligence, he could not recover for trespass.

The Minnesota courts clearly follow the Indiana courts in requiring the theory of the pleadings. In Sorenson v. School District[29] a suit was brought, by two resident voters and taxpayers, to enjoin the officers of the school district from abandoning a certain school house site and the school established upon it, from erecting a new school house upon another section of the township, and from issuing bonds therefor. Plaintiffs stated in their complaint that the proceedings for the selection of the new site had been abortive and had resulted, therefore, in a failure to make a proper selection; but they made no suggestion that another site than that claimed by the defendants to have been chosen was in fact selected. The defense was that 27 voted for and 24 against the site, and verdict was consequently ordered for the defendants. Thereupon plaintiffs desired to amend their complaint, to show that another site than that voted for, had been chosen, but this was refused by the Court, it saying that a complaint must proceed upon a distinct and definite theory, and that this had been done in this case, and therefore plaintiffs must lose since they had not established it. Practically identical language with that of Indiana court opinions is used in the opinion in the Minnesota case.[30]

Summarizing, it may be said that the theory of the pleadings is required, in some fashion at least, in the following states: New York, Massachusetts, Missouri, Indiana, Nebraska, Minnesota, South Dakota, Kentucky, and New Mexico. The general

of idealizing the record, to the expense of justice.

See to similar effect Huston v. Tyler (1897), 140 Mo. 252, 36 S. W. 654; International Co. v. Smith (1885), 17 Mo. App. 264; Schneider v. Railroad (1882), 75 Mo. 295; Waldhier v. Railroad (1880), 71 Mo. 514.

(28) The court in its opinion said: "The language copied from the petition imports the theory of negligence. The mere use of the word 'wrongfully,' in absence of alleged facts constituting trespass, does not imply a cause of action based on that theory. If plaintiff intended to require defendants to answer for excavating in the alley in violation of law, the facts constituting trespass, as distinguished from negligence, should have been pleaded in the petition."

(29) (1913), 122 Minn. 59, 141 N. W. 1105.

(30) The requirement of a theory of the pleadings prevails in the following states, as appears from cases cited:

For criticism of the view that abolition of pleadings would result in uncertainty and confusion, see Dean Pound, "Some Principles of Procedural Reform," 4 Illinois Law Review, 388, 491, at pages 494-97. See also Clarke B. Whittier, "Notice Pleadings," 31 Harvard Law Review, 501.

South Dakota—Jones v. Winsor (1908), 22 S. D. 480, 118 N. W. 716. In an action for conversion, plaintiff's request to have his omission of allegations of ownership treated as surplusage and the action maintained as one for money had and received, was refused; the court quoting extensively from Indiana courts holding to a theory of the pleadings.

Kentucky—Smith v. Robinson (1919), 185 Ky. 76, 214 S. W. 771. Action on an express contract not proved, but court said action should be dismissed even though an implied one had been proved.

New Mexico—Gallegos v. Sandoval (1910), 15 N. M. 216, 106 Pac. 373. Action of trespass against sheriff for abusive use of process maintained on a finding that the sheriff was oppressive, although not shown as was necessary under the statute, that sheriff had writ in his possession more than sixty days before levy. Court also quotes from Indiana opinons as to theory of pleading.

principles of the theory, code provisions to the contrary, may be stated as follows:

1. Where the action is based upon fraud, though other facts are alleged and proved entitling the complainant to recover, if the fraud is not proved, no recovery will be granted.

2. Where the suit was in equity, when it should have been at law, or vice versa, likewise no recovery will be permitted, even though sufficient facts appear which in justice and equity entitle the complainant to relief.

3. Where the action is ex contractu and facts are proved instead, which should warrant recovery ex delicto, no recovery is permitted. The converse is also true.

4. If the suit is on an express contract, and only an implied one is proved, no recovery will be granted.

5. The usual reasons given for requiring a definite theory are that (1) It would be a surprise to the defendant to permit recovery on another ground; (2) It would fail in tendering a definite issue or issues if no theory were adopted, and would lead to uncertainty and confusion; (3) The court itself would be in ignorance of the nature of the controversy if the plaintiff did not elect some definite theory of the pleadings.[31]

E. F. ALBERTSWORTH.

Laramie, Wyo.

(31) Cf. the dissent of Mr. Justice Peckham in De Graw v. Elmore, supra, n. 3: "The merits of the cause have been fully tried, without surprise to either party. * * * The defendant understood the complaint; there can be no pretense that he was misled by it. This variance between the pleadings and the proof the court had full authority to amend or to disregard under the Code."

MUNICIPAL CORPORATIONS—ORDINANCE REGULATING MOVING.

CITY OF CHICAGO v. HEBARD EXPRESS & VAN CO.

134 N. E. 27.

Supreme Court of Illinois. Feb. 22, 1922.

An ordinance, requiring persons engaged in moving household goods and personal property to keep a record of, and report to a city bureau, the names of the parties, the addresses, to and from which the moving is done, the character of the property moved, etc., requiring the party for whom the moving is done to furnish such information, providing for the furnishing of information concerning any particular removal to any person applying therefor on payment of 50 cents, and imposing a penalty, is not authorized as a regulation of the business of moving or hauling for hire, under Cities and Villages Act, art. 5, § 1, cl. 42, or as a police ordinance under clause 66, but is an unreasonable, inquisitorial interference with the liberty of individuals, and is void.

Samuel A. Ettelson, Corp. Counsel, and Louis P. Piquett, both of Chicago (Daniel Webster and Rupert F. Bippus, both of Chicago, of counsel), for appellant.

Brady, Rutledge & Devaney, of Chicago (Andrew Rutledge, of Chicago, of counsel), for appellee.

DUNN, J. The city of Chicago sued the Hebard Express & Van Company in the municipal court for a violation of an ordinance of the city by moving for hire certain household furniture and personal property from No. 855 Ainslee street, in the city of Chicago, without thereafter filing in the office of the bureau of statistics and municipal reference library of the city of Chicago the statement required by section 1 of the ordinance. The court on a trial without a jury rendered judgment for the defendant, and the city appealed to this court; the judge having certified that the validity of an ordinance was involved, and the public interest required that the appeal should be taken directly to this court.

The first three sections of the ordinance are as follows:

"Sec. 1. Every person, firm or corporation owning or operating any moving van, furniture car, transfer wagon, express wagon, delivery wagon, or any other vehicle engaged in moving or hauling for hire in the city of Chicago, shall keep a record of the place from which and the place to which he or it moves the household goods or personal property, or any of them, of any person who is, or persons who are, removing or vacating any dwelling house, flat, apartment, room, rooms or place of residence or abode or place of business in the city of Chicago, which record shall show the name and address of the mover, the name of the person for whom the moving was done, the name of the person who was the owner or ostensible owner of the said household goods or personal property moved, the address from which in the city of Chicago and to which in the city of Chicago, or outside of the city of Chicago, as the case may be, such moving was done, and the name and address of the common carrier to whom such household goods or personal property were delivered, with the date of such removal or delivery, and the character of the articles moved.

"Sec. 2. Every person, firm or corporation owning or operating any of the vehicles aforesaid, and any person, firm or corporation not engaged in moving or hauling for hire in the city of Chicago but in control or possession of

any of the vehicles aforementioned, who shall, for a valuable consideration or otherwise, move the household goods or personal property, or any of them, of any person who is, or persons who are, removing or vacating any dwelling, house, flat, apartment, room or place of residence or abode or place of business in the city of Chicago, shall, not later than Monday following the date of such moving, file in the office of the bureau of statistics and municipal reference library of the city of Chicago, or send by registered mail to such bureau, a full and correct statement of all such hauling or moving done, containing the information as required in section 1 hereof. Upon receipt of such statements the head of such bureau of statistics and municipal reference library shall keep a register of all such transactions in a book or books, or other suitable form of maintaining records, to be used for that purpose, with an alphabetical index of the names of the persons for whom such hauling has been done. Said register shall not be open to the inspection of the public, but the head of such bureau shall furnish to any person inquiring therefor, information as to any particular change or removal, for which a charge of fifty cents shall be made for information concerning each change or removal: Provided, that no fee shall be charged for any such information furnished to the department of police.

"Sec. 3. Upon request of the person, firm or corporation owning or in charge or in control of the vehicle in which said household goods or personal property, or any of them, are to be removed, the person for whom such moving is being done shall give to said owner or person in charge or in control of any vehicle, all information necessary to enable him to make and keep such record or statement. It shall be unlawful for any person to give to said owner or person in charge or in control of any vehicle hauling or moving said household goods or personal property, or any of them, a fictitious name or to deceive him, or to make knowingly any false statement concerning any of said information requested by said owner or person in charge or in control of said vehicle, the obtaining of which is necessary to enable him to make and keep said record or statement."

The sixth section provides for a fine not exceeding $200 for any violation of the ordinance.

It was stipulated on the trial that the appellee is engaged in the city of Chicago in the business of moving and hauling for hire; that it moved the property of Hobart Merrifield from No. 855 Ainslee street, in the city of Chicago, to some other point in the city, and did not file the statement required by the ordinance. The appellee proved that in its business it had in the course of a year approximately 5,000 moving jobs, and moved anywhere within a radius of 300 or 400 miles, where the roads permitted; that 80 to 90 per cent. of the moving is done within the city of Chicago, about 9 per cent. from Chicago to places outside the city in the state of Illinois, and about 1 per cent. to places outside the state.

The appellee contends that the ordinance is invalid because the Legislature did not confer power upon the city to adopt it, because it is unjust, unreasonable, and oppressive, and because it is in conflict with the state and federal Constitutions.

No provision of the state Constitution is referred to in the brief or argument of the appellee, and no provision of the federal Constitution except that which declares that Congress shall have power to regulate commerce among the several states. The ordinance does not violate this provision. An ordinance adopted in the exercise of the police power, for the protection of the community, may extend, incidentally, to the operation of a carcier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to federal legislation. Barrett v. City of New York, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. Ed. 483; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; New York, New Haven & Hartford Railroad Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853.

The appellant contends that authority to the city to pass the ordinance is found in clauses 42 and 66 of section 1 of article 5 of the Cities and Villages Act (Hurd's Rev. St. 1919, c. 24, § 62), which are as follows:

"Forty-second—To license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation.

"Sixty-sixth—To regulate the police of the city or village and pass and enforce all necessary police ordinances."

Under these clauses the city has the right to regulate persons engaged in the business mentioned in the ordinance; that is, moving or hauling for hire. The reasonableness of an ordinance passed by a municipal corporation in the exercise of a power given by the Legislature expressly to pass the particular ordinance is not a subject for judicial inquiry, but when the power to legislate on a particular subject is conferred and the particular manner of its exercise is not prescribed, then the question whether an ordinance passed pursuant to the power is a reasonable exercise of it by the municipal corporation is a question of law for the determination of the court. While in the latter case an ordinance which is clearly unreasonable, unjust, and oppressive will be held void, the presumption is in favor

of the validity of an ordinance passed in pursuance of statutory authority, and the burden is on the person questioning it to show clearly that it is unreasonable. City of Lake View v. Tate, 130 Ill. 247, 22 N. E. 791, 6 A. L. R. 268; Hawes v. City of Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225; Chicago & Alton Railroad Co. v. City of Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190; People v. Village of Oak Park, 266 Ill. 365, 107 N. E. 636.

The ordinance is clearly not a reasonable ordinance regulating the business. The information required to be furnished has no relation to any purpose of regulating the business of moving. The language of clause 42 indicates the purpose of the Legislature in giving the power of regulation to a city council to be the fixing of compensation and to regulate the business so as to prevent extortion, imposition, and wrong to persons compelled to employ carriers of the classes mentioned in the statute in having their property or persons carried from one part of the city to another. The information here required would be of no assistance to the city in accomplishing this purpose, and therefore the ordinance requiring it is unreasonable if the ordinance is to be referred only to the exercise of the power conferred by clause 42. It is contended, however, that the power may be referred to clause 66, and the ordinance held valid as an exercise of the police power, and it is claimed that the information obtained is made use of by the police for the purpose of looking up persons wanted for crime or under suspicion or missing, and is of material assistance in the suppression of crime. It is also claimed that the information is important to the department of health in tracing and locating cases of contagious disease in the city. The ordinance is not limited to these purposes, even if possibly it may be incidentally of some value for such purposes, but provides for the sale of the information to any person inquiring as to any particular change or removal. This provision, of course, has no reference to the suppression of crime or the discovery of contagious disease, but authorizes giving the information for any purpose, public or private, to any person who may be willing to pay for it from any motive, friendly or unfriendly, malicious or merely curious. The ordinance requires the carrier to state the character of the articles removed, and section 3 requires the person for whom the moving is done to give the carrier all the information necessary to enable him to make the report, and imposes a penalty for refusal to do so upon request. The ordinance applies to every person who removes from any house, flat, apartment, or room in the city of Chicago to any other place in the city, and has his personal property removed. His personal property may be contained in one or more trunks or boxes, but upon the request of the person moving the property the owner is required by this ordinance to furnish for the use of the police department of the city of Chicago, or any other person who may see fit to inquire and is willing to pay a small fee for the information, a statement of the character of the property which he is having moved. The effect would be that every person changing his place of abode in the city of Chicago would be obliged to report for the benefit, not only of the police, but of every inquirer, the place from which he moved and the place to which he moved and the character of the property which he took with him. There are some businesses in which police regulation is peculiarly needed, such as those of pawnbrokers and the keepers of junk shops, because thieves frequently attempt to dispose of stolen goods at the places where such businesses are carried on, and the keepers not infrequently become fences for such goods, and therefore provisions for the strict regulation and supervision by the police of those engaged in those businesses and of their dealings have been sustained, but the same reason does not apply to the business of moving or to people generally who have their personal property moved.

The appellant cites Lawson v. Recorder's Court of Detroit, 175 Mich. 375, 141 N. W. 623, 45 L. R. A. (N. S.) 1152, in support of the validity of the ordinance. The ordinance in that case was limited to public moving van drivers, and required a report to the police commissioner, only, of the place from and to which household furniture was moved, and the name of the person for whom moved. It required no information from the owner of the property or the person from whom it was moved, and imposed no penalty or requirement of any kind on them. Even if we were disposed to agree with that case, it affords no support for the broad and sweeping terms of the ordinance here in question. An ordinance more nearly resembling that in question here was sustained by the Supreme Court of Missouri in Wagner v. City of St. Louis, 284 Mo. 410, 224 S. W. 413, 12 A. L. R. 495, but we do not agree with that case It would not be a reasonable exercise of the police power for the city to require any person occupying temporarily or for an indefinite time a home or room in the city to procure a permit from the

chief of police before he could remove to another house or room and have his baggage or property moved. Neither is it reasonable to require him to report such removal to the police department.

Without regard to any constitutional question, the ordinance is an unreasonable, inquisitorial interference with the liberty of individuals to move from place to place and have their property moved without interference, and is void.

The judgment will be affirmed.

Judgment affirmed.

NOTE—*Validity of Ordinance Requiring Movers to Report Names and Addresses of Persons Whose Goods Are Moved.*—An ordinance of the city of St. Louis requiring movers hauling household or personal effects to or from any location within the city to notify the city register within ten days thereafter of the name of such person, firm or corporation, owning, or having the possession and control of such property, the street address from and to which such property was moved, a brief general description of the property, the date of such removal and the name and address of the mover, has been upheld by the Supreme Court of the State of Missouri in Wagner v. St. Louis, Mo., 224 S. W. 413, 12 A. L. R. 495. The provisions of the city charter which the Court held to authorize the enactment of this ordinance are as follows: "To license and regulate all persons, firms, corporations, companies and associations engaged in any business, occupation, calling, profession or trade." And, "to exercise all powers granted or not prohibited to it by law or which would be competent for this charter to enumerate." In this respect the Court said:

"Where an ordinance is legally passed with due authority under the organic law of the city and state, the Court will not declare it unreasonable, unless no difference of opinion can exist upon the question. A clear case must be made to authorize the Courts to interfere on that ground."

A similar ordinance was upheld by the Court in the case of Lawson v. Connolly, 175 Mich. 375, 141 N. W. 623, 45 L. R. A. (N. S.) 1152. We quote from the opinion of the Court as follows.

"Counsel for relator say: 'It is a well known fact that, in large and populous cities, tenements and their occupants are often breeding places for infectious and contagious diseases; that many times, because of the ignorance or poverty, or even fear, of the tenants, the conditions are concealed from the public health officers, thereby endangering the health, not of one, but of many. The vehicle owners that have practically a monopoly of transportation should not be heard to complain of an ordinance which will assist our public health officers in the great work of sanitation and disease suppression. If it be contended that, as a result of the enforcement of this ordinance, merchants will know the whereabouts of "dead beats" and undesirable customers, we may answer that such an argument only demonstrates that the ordinance is as well in the interest of promoting the morals as well as the health of the community, both of which are proper subjects of the exercise of police power.' This statement is criticized by counsel for respondent and it is urged that it is absurd to claim that the provisions is in the interest of either the public health, safety, or morals. While it may be problematical how much the public health, morals, or safety are subserved thereby, it does not seem to us that the requirements of the section are so unreasonable as to warrant the Court in overruling the legislative determination and holding it void."

CORRESPONDENCE

NEW BILL OF RIGHTS AMENDMENT

Editor, Central Law Journal:

There is now before Congress a proposed Amendment to the Constitution, introduced by Senator Wadsworth of New York and Representative Garrett of Tennessee, known as the "New Bill of Rights Amendment," to which every lawyer and layman who believes in preserving the "Home Rule—Local Self-Government" plan of our Constitution, and who is opposed to a "Consolidated—National Government" such as the fathers feared and believed they had forever guarded against, should give his approval and support. It provides:

(1) That no state legislature shall vote for a federal Amendment unless at least one house thereof was elected after it is proposed by the Congress, thus giving their constituents some say in the matter. This follows the provision of the Tennessee State Constitution, which was stricken down by the Supreme Court in Leser v. Garnett.

(2) That any State may submit a federal Amendment to popular vote. This follows the provision of the Ohio State Constitution, of which the Supreme Court made a "scrap of paper" in Hawke v. Smith.

The necessity for adopting this Amendment becomes manifest when we recall that out of thirty-eight state legislatures ratifying the Nineteenth Amendment thirty-four were elected before proposal upon other issues and had no popular mandate from their people. Many also ratified the Eighteenth Amendment without a popular sanction.

This proposition will go a long way to preserve the "Federal" nature of our Union, seriously affected by the two decisions above mentioned, and to prevent more "irresponsible government by constitutional amendment."

GEORGE STEWART BROWN.

Brooklyn, N. Y.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1922—WHEN AND WHERE TO BE HELD.

American—San Francisco, Cal., August 9, 10 and 11.

California—San Francisco, August 7 and 8.

Colorado—Colorado Springs, July 28 and 29.

Florida—Orlando, June 15 and 16.

Iowa—Sioux City, June 22 and 23.

Kansas—Salina, November 27 and 28.

Kentucky—Louisville, latter part of June.

Maryland—Atlantic City, N. J., June 29 and 30 and July 1.

Michigan—Saginaw, June 9 and 10.

Minnesota—Minneapolis, August 30, 31 and September 1.

New Hampshire—New Castle, June 24.

New Jersey—Atlantic City, June 16 and 17.

North Carolina—Wrightsville Beach, June 27, 28 and 29.

Ohio—Cedar Point, July 5, 6 and 7.

Pennsylvania—Bedford Springs, June 27, 28 and 29.

Utah—Salt Lake City, August 19.

Virginia—Lynchburg, June 6, 7 and 8.

Washington—Tacoma, August 1, 2 and 3.

West Virginia—Huntington, November 16 and 17.

Wisconsin—Fond du Lac, June 27, 28 and 29.

Wyoming—Laramie, June 15 and 16.

HUMOR OF THE LAW.

"Who remembers when one's newspaper used to come damp and clammy?"

Speaking of that, the story is told of Lord Melbourne in the old days meeting an editor who had attacked him in his newspaper. The editor was bundled up and remarked that he had a severe cold.

"Ah!" said Lord Melbourne, "that comes from lying on damp sheets."—*Boston Transcript.*

"Yassuh, mah Sambo am a perfect gemmum, even if we-all do get into a spat now an agin. Yassuh, he nevah hits me where it shows."—*The Orange Owl.*

Bird S. Coler, New York's commissioner of public welfare, was talking at a luncheon about mistakes.

"To blame unemployment on labor," he said—"or to blame it on capital, either—is as grievous a mistake as the young minister made."

"A young minister sat at a dinner party one evening between two very pretty young women—one whose husband was working in Florida and the other whose husband had recently died.

During the dinner the young widow, fanning herself violently, sighed:

"'Dear me, how hot it is!"

"The minister, mistaking her for the lady whose husband was in Florida, answered with a smile of gentle reproof.

"'Ah, but think how much hotter it must be where your husband is!'"—*Los Angeles Times.*

A New Orleans lady was waiting to buy a ticket at the picture show, when a stranger bumped her shoulder. She glared at him, feeling it was done intentionally.

"Well," he growled, "don't eat me up."

"You are in no danger, sir," she said, "I am a Jewess."—*The Lawyer and Banker.*

"Sorry," said the constable, "but I'll have to arrest ye; ye've been drivin' along at the rate of 50 miles an hour."

"You are wrong, my friend," said the driver. "And here's $2 that says I wasn't."

"All right," returned the minion of the law, pocketing the money. "With all that against me, I ain't going to subject the county to the expense of a trial."—*Pittsburgh Sun.*

Schoolboy Howlers: Habeas corpus means that you may have the head and I will take the body.

The constitution of an animal means the governing part.

Reverie means a man who umpires a prize fight.

The architects of Gothic buildings felt that these suggest the eternal exasperations of a great creator.—*Care and Comment.*

Mr. Dunn stood up in court, charged with disorderly conduct, his head swathed in bandages, and demanded a trial by jury.

"It's only a minor offense," advised the judge. "Why not plead guilty, pay a small fine and get it over?"

"No, judge," replied Mr. Dunn determinedly, "I want a trial by jury. The last thing I remember was when I was standing peaceful-like on the corner and that big guy wandered along. The next thing was when two doctors were sewing me up. Unless I have a trial and hear witnesses I never will find out what I called the big stiff."—*American Legion Weekly.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles** — Collision. — A person attempting to pass a car in front of him is bound to exercise a high degree of care, to see that the situation is such that he can safely do so and observe, not only the space he is intending to traverse, but also the opportunities which an approaching car would have to pass him safely.—Crystal Spring Co. v. Cornell, R. I., 116 Atl. 196.

2.——Collision.—Evidence that the driver of defendants' automobile when it collided with plaintiffs' machine had been driving with defendants' wife and had been directed by her to take the car to the garage, but had driven it around for some time for his own pleasure before the accident, shows conclusively that at the time of the accident he was not acting on behalf of defendants.—Savage v. Donovan, Wash., 204 Pac. 805.

3.——Contributory Negligence.—In action for the death of a pedestrian struck by defendant's automobile, evidence that the deceased attempted to cross street intersection diagonally at a time when it was misting, without looking in the direction from which the automobile by which he was struck was approaching, held to justify court's finding that he was contributorily negligent.—Thompson v. White, Cal., 204 Pac. 561.

4.——Contributory Negligence.—In an action by one riding on the seat with the driver of an automobile for injury from a collision with a street car, a requested instruction that, although the negligence of the driver was not to be chargeable to the passenger, yet a passenger sitting in the front seat must use some care, and if he allows, without protest, himself to be driven into a place of danger, the passenger may be found guilty of contributory negligence apart from that of the driver, was properly refused; the request being open to the objection that it required the passenger to do something for which he may have had no opportunity.—Barrett v. Rhode Island Co., R. I., 116 Atl. 199.

5.——Humanitarian Doctrine.—In an action against an automobile driver for injuries to a pedestrian, evidence on behalf of plaintiff that she stepped into the street and onto the first car track at a time when defendant was far enough away so that he could easily have stopped, and that when she stopped to let a street car pass her on the other track, defendant ran into her and injured her, held sufficient to take to the jury the question of defendant's liability under the humanitarian doctrine.—Schultz v. Upshaw, Mo., 237 S. W. 829.

6. **Bankruptcy**—Amended Petition.—A bankrupt, who has demanded a jury trial, which has been entered on, cannot during its course seek for a dismissal of the petition because of a defect therein, which could have been cured by amendment, but is entitled only to such relief as would insure fairness in trying the issues.—Bradley v. Huntington, U. S. C. C. A., 277 Fed. 948.

7.——False Swearing.—False swearing in bankruptcy, contrary to Criminal Code, § 125 (Comp. St. § 10295), is not equal in enormity to the crime of perjury denounced by the general statute, and the burden of proof in perjury cases, requiring two witnesses to contradict the oath of accused, is practically annulled, and the burden on the government is only to prove beyond a reasonable doubt the guilt of accused.—Schonfeld v. United States, U. S. C. C. A., 277 Fed. 934.

8. **Banks and Banking**—Bills of Exchange.—A purchase from a trust company of checks or foreign bills of exchange constituted a sale of credit, the checks or bills of exchange being a means of establishing or transmitting the credit, which were completed contracts, the obligation of which was broken by the dishonor of the checks or bills of exchange, and the amount paid could not be recovered in an action for money had and received; the consideration not having failed.—Foreign Trade Banking Corporation v. Cosmopolitan Trust Co., Mass., 134 N. E. 403.

9.——Inference of Guilt.—In an action by a bank against its cashier and his surety for a shortage in his accounts, fraudulent entries made in the books by the cashier, or by his direction, were sufficient, when unexplained, to raise an inference of the cashier's guilt.—Holder v. Farmers' Exch. Bank of Stillmore, Ga., 110 S. E. 762.

10.——Insolvency.—Where a trust company, though not complying with the statute as to reserves and not keeping the assets in its savings department separate and distinct from its general assets, and though it had been apparently in a somewhat shaky condition for several years, had been able to continue business and was continuing to meet its obligations as they arose, and its officers did not anticipate that the commissioner of banks would take possession of its assets and property, under G. L. c. 167, § 22, persons making deposits during insolvency held not entitled to rescind and recover their deposits, thereby obtaining a preference over other creditors.—Steele v. Allen, Mass., 134 N. E. 401.

11.——Post Dated Check.—The fact that a bank check was certified does not obviate the rule that the holder, who seeks to recover thereon against the bank, must be a holder in good faith.—Wilson v. Mid-West State Bank, Iowa, 186 N. W. 891.

12.——Preference.—Where a bank holding a claim for collection receives in payment thereof a check upon itself, drawn by the debtor against a sufficient deposit, there being enough cash on hand to meet it, charges the amount to him, and attempts to remit it to the creditor by cashier's check, but passes into the control of a receiver before such cashier's check in due course of business is presented for payment, having at all times had cash on hand in excess of the amount thereof, the creditor is entitled to recover the amount of his claim from the assets of the receivership as a trust fund in preference to general creditors.—Goodyear Tire & Rubber Co. v. Hanover State Bank, Kan., 204 Pac. 992.

13.——Preference.—Where a check of one having a checking account large enough to cover it is sent by mail for collection to the bank on which it is drawn, which has at the time of its receipt, and at all times thereafter, sufficient

cash to meet it, and the bank charges it to the drawer and at once mails to the owners a draft for the amount, payment of which is prevented by the bank commissioner taking charge of the bank issuing it before it could be presented in due course of business, the owners of the check have a preferred claim for its amount against the assets of the suspended bank.—Kesl v. Hanover State Bank, Kan., 204 Pac. 994.

14. **Bills and Notes**—"Accommodation Party."—Under Rev. St. 1908, § 4492, defining an "accommodation party" to be one who signs the instrument without receiving value therefor, and for the purpose of lending his name to some other person, the "value" referred to is value for the negotiable instrument, and not for the loan of the name by way of accommodation, and where defendant received the stock from plaintiff to deposit with a bank as collateral security for a note signed by defendant to get money which was given to plaintiff, leaving $500 of the sum so obtained for a short time in the bank in defendant's name to make it appear to the bank that plaintiff was not concerned in the transaction, the remaining $500 being afterward paid out on behalf of plaintiff at its direction, defendant was an accommodation maker.—McGhee Inv. Co. v. Kirsher, Col., 204 Pac. 891.

15.——Holder in Good Faith.—Under Negotiable Instruments Act, §§ 91, 94, 96, 98, in a suit on notes transferred to plaintiff in violation of an agreement of the transferor not to negotiate them before the shipping of certain furniture, for the purchase of which the notes were given, the burden of proof to show that he was a holder in good faith was on plaintiff.—Walkof v. Strober, N. Y., 192 N. Y. S. 716.

16.——Renewal.—The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. As between the original parties and as against transferees who are not bona fide purchasers for value, a renewal note is open to all defenses which might have been made against the original note.—Auld v. Walker, Neb., 186 N. W. 1008.

17. **Carriers of Passengers**—Collision.—The negligence of a railroad company in operating its trains within the limits of a city in violation of a municipal ordinance regulating the speed of trains within the city limits may amount to negligence proximately contributing to the injury of a passenger on such a train who is injured in a collision between it and an obstacle on the track.—Ga., 110 S. E. 750.

18.——Negligence.—Where the motorman lost control of a street car while going down a hill, and jumped off, and the conductor advised plaintiff passenger to jump off, and she did so, and was injured, plaintiff could plead and submit to the jury two acts of negligence, or either of them: (1) The negligence of defendant in suddenly confronting plaintiff with a real or apparent danger of imminent injury on account of permitting the car to get beyond control, thereby terrifying plaintiff into yielding to the impulse or instinct of self-preservation; (2) negligence of conductor in negligently giving the alarm to alight from the car, and in advising and assisting plaintiff to alight, causing plaintiff to believe there was imminent danger in remaining on the car.—Hellar v. Kansas City Rys. Co., Mo., 237 S. W. 811.

19. **Commerce**—Tax on Foreign Corporation.—A tax on a foreign corporation, which transacted all its business within the state and had no business office elsewhere, which was computed, not alone on the value of tangible property of the corporation within the state, but also on the volume of its business, including its interstate business, was not invalid as a burden on interstate commerce, especially where the portion of the tax computed on the basis of interstate business was comparatively negligible.—Hump Hairpin Mfg. Co. v. Emmerson, U. S. S. C., 42 Sup. Ct. 305.

20. **Contracts**—Full Performance.—A contract, whereby defendant agreed to advertise in plaintiff's magazine and take 12 pages within 16 months, the advertising matter to be furnished by defendant, was not an agreement to reserve space for an advertisement which plaintiff could formulate and publish when it pleased, and was not performed by the publication of defendant's name and address on its repudiation of the contract and failure to furnish copy, especially where 9 of such publications were made in 3 of the monthly issues of the magazine.—Druggists' Circular, Inc., v. American Soda Fountain Co., Mass., 134 N. E. 384.

21. **Corporations**—Corporate Life.—Sole directors of a New York corporation may, on petition be made parties plaintiff in an action by the corporation, where they wish to be added to protect the property and rights of the corporation, notwithstanding the life of the corporation has expired, in view of General Corporation Law N. Y. § 35, making directors trustees, with authority to sue and recover debts and property of corporation, after the life of the corporation has expired.—Curtis v. North American Indian, Inc., U. S. C. C. A., 277 Fed. 909.

22.——Sale of Worthless Stock.—Where stock which plaintiff was induced to purchase by defendant's fraud was worthless, a tender of its return before suit to recover the purchase price paid was unnecessary.—Whitlow v. Shortridge, Mo., 237 S. W. 834.

23. **Covenants**—Restrictive.—Assuming that a restrictive covenant that a parcel of land should not be used for a coal business did not run with the land, or create a negative easement in the restricted parcel for the benefit of lands owned by the covenantee, a court of equity would nevertheless enforce it against a grantee taking title through a deed reciting the covenant and subject thereto, or against a grantee taking title with full knowledge of its existence, although omitted from the deed intentionally or otherwise.—Rubel Bros. v. Dumont Coal & Ice Co., N. Y., 192 N. Y. S. 705.

24. **Criminal Law**—Sale of Narcotics.—Since Anti-Narcotic Act Dec. 17, 1914, is a taxing act, with the incidental purpose of minimizing the spread of addiction to the use of drugs, and section 2 of the act makes it unlawful to sell any of the drugs, except as therein specified, without expressly requiring knowledge by the seller of the character of the drug sold a person dealing in drugs is required to ascertain at his peril whether that which he sells comes within the statute, so that an indictment for violation of that section need not allege that defendants knew the character of the drugs sold.—United States v. Balint, U. S. S. C., 42 Sup. Ct. 301.

25. **Highways**—Easement by Public.—An easement cannot be acquired by the public longitudinally along a railroad right-of-way by user, particularly where such user, except along a public highway, is unlawful under Railroad Act, § 55, and the company plainly indicates by signs that it is not a public thoroughfare, such use being permissive only, and mere user without objection being insufficient to constitute an invitation.—McCran v. Erie R. Co., N. J., 116 Atl. 103.

26. **Insurance**—Acceptance of Premiums.—Where fraternal benefit society knew that a member had disappeared and that his wife, beneficiary of the certificate, had secured a divorce and had remarried, and accepted payments of premium on the certificate from her both before and after her divorce, it may not dispute her rights to recover regardless of Laws 1911, p. 424, § 6, restricting beneficiaries under fraternal benefit certificates to relatives by blood or marriage or those dependent upon the member, and of a by-law conforming to the provisions of the statute.—Security Benefit Ass'n v. Verdery, Col., 204 Pac. 895.

27.——"Hostile Fire."—In a steam boiler policy, an exception of "loss or damage due to fire" refers only to a "hostile" fire, such as a fire destroying the building in which the boiler is located, and not to fire in the furnace heating the boiler; and, where the policy covers cracks and fractures in the boiler, it is immaterial whether cracks and fractures developing in the boiler were due to concealed or inherent defects in the boiler or to the negligence of the person in charge of the boiler in caring for the fire or maintaining the water in the boiler at the proper level.—First Nat. Bank v. Royal Indemnity Co., Iowa, 186 N. W. 934.

28.——Partial Dependency.—Partial dependency within the constitution of a benefit society

providing for payment of a death benefit to dependent relatives may exist even though the claimant might have subsisted without the assistance furnished.—Silberstein v. Vellerman, Mass., 134 N. E. 395.

29.——Payment of Premium.—Where the general agent of an insurance company agreed to give insured 60 days in which to pay the premium, and received and retained the premium at the expiration of that time, the provision of the policy that it should not take effect until the premium was paid was waived, and insured is entitled to recover for loss sustained before the payment of the premium.—Capital Live Stock Ins. Co. v. Campion, Col., 204 Pac. 604.

30.——Theft.—Whether property covered by theft policy was stolen does not depend upon the length of time that the property was converted nor the extent of the use to which the thief was able to put it if possession was actually taken by the wrongdoer, and the intent to steal can be inferred.—Price v. Royal Ins. Co., Wash., 204 Pac. 803.

31. **Insurrection and Sedition**—Criminal Syndicalism.—Syndicalism Act, § 3, defining "criminal syndicalism" as the advocacy of crime or violence as a means of effecting industrial or economic change or of effecting a revolution, does not violate Const. art. 1, § 24, or Const. U. S. art. 3, § 3, providing that treason shall consist only in levying war against the government or adhering to its enemies and giving them aid and comfort, since those provisions do not prevent the punishment of acts intended for the subversion of government which have not ripened into treason.—State v. Laundy, Ore., 204 Pac. 958.

32. **Intoxicating Liquors**—Recovery for Damages.—Where the unlawful sale of intoxicating liquor contributes to the death of the person who consumed it, there may be a recovery for resulting damages without proof that the wrongful act was the proximate cause of such death.—Thamann v. Merritt, Neb., 186 N. W., 1003.

33. **Landlord and Tenant**—Repairs.—Covenants in the lease of a garbage plant to make "all necessary repairs and replacements" and "to keep the plant * * * in as good condition as at present" should be construed together, and when so construed, "necessary repairs" mean such ordinary repairs as are necessary for the tenant to make to carry on the business contemplated, while the required "replacements" contemplate replacing destroyed portions or parts.—Marcy v. City of Syracuse, N. Y., 192 N. Y. S. 674.

34.——Unavoidable Casualty.—The freezing of the pipe in the attic of a leased house leading to the expansion tank of the hot water heating system, causing the hot water heater to burst, was not an "unavoidable casualty" within provisions of the lease requiring surrender of the premises in good order, reasonable use and wearing, fire, and other unavoidable casualties excepted, and providing for abatement of rent for destruction or damage of the premises by fire or other unavoidable casualties, as the freezing of pipes is not an occurrence of an unusual, unexpected, or extraordinary character or beyond human control.—French v. Pirnie, Mass., 134 N. E. 353.

35. **Master and Servant**—Interstate Commerce.—An ash pit or cinder pit where are dumped the ashes and cinders from engines engaged both in intrastate and interstate commerce, and which is a necessary facility in the operation of the railway, is also a facility or instrumentality used in interstate commerce, so that persons engaged in cleaning out or emptying such pit should be held engaged in work in furtherance of such commerce.—Stavros v. Chicago, M. & S. P. R. Co., Minn., 186 N. W. 942.

36.——Liability for Police Officer's Act.—As a general rule, in the absence of statute, a private person or corporation is not responsible for the acts of a special police officer appointed by public authority, but employed and paid by such person or corporation, when the acts complained of are performed in carrying out his duty as a public officer, but where he is acting in the performance of the duties for which he is employed, or his movements are actively directed by his employer, and he represents the employer, and not the public, the employer may become liable for his acts.—Zygmuntowicz v. American Steel & Wire Co., Mass., 134 N. E. 386.

37.——Negligence.—A pipe fitter who was not required to inspect the ditch in which he was called upon to work to determine whether it was a safe place, and who was injured when the undermined, unpropped wall of the ditch caved in, was not as a matter of law guilty of contributory negligence in working in a bent-over position, with nothing to indicate the danger.—Littig v. Urbauer-Atwood Heating Co., Mo., 237 S. W. 779.

38.——Scope of Employment.—Where an automobile truck driver, returning to garage, departed from the route to the garage in giving boys a ride, the question of whether he was on his way to garage so as to be engaged in master's business at time of accident to one of the boys after driver had ordered them off truck held for the jury, in view of presumption that servant in charge of master's automobile is engaged in master's business.—Fiocco v. Carver, N. Y., 192 N. Y. S. 493.

39. **Mechanic's Liens**—Estate by Entirety.—The separate estate of the husband in an estate held by the entirety cannot be subjected to a mechanic's lien judgment and sold under execution issued thereon.—I. R. Goldberg Plumbing Supply Co. v. Taylor, Mo., 237 S. W. 900.

40. **Municipal Corporations**—Defect in the Way.—Under G. L. c. 84, § 1, requiring towns to keep public ways safe and convenient for travelers, and chapter 229, § 1, imposing liability for death by reason of a defect or want of repair of any way, etc., towns are not liable for every danger and inconvenience to which a traveler on the street may be subjected, and, while actionable defects are not limited to obstructions and excavations in the roadbed, a limb of a tree arching over the sidewalk and which fell upon telegraph wires and later fell to the street, injuring a traveler, was not a defect in the way.—Andresen v. Town of Lexington, Mass., 134 N. E. 397.

41. **Negligence**—Erroneous Instruction.—An instruction concerning negligence of driver of wagon killing child held erroneous by reason of the misuse of the word "or" for "and," so as to render defendant liable if the driver failed to keep a vigilant watch ahead without regard to any other fcts in evidence.—Kersulov v. Boehmer Coal Co., Mo., 237 S. W. 887.

42. **Parent and Child**—Community Property.—Where widow, after her husband's death, sold community property and the purchaser required her to procure signature of her daughter to deed, he had a right to assume, on her tender of deed executed by herself and daughter, that she was authorized to receive that part of the consideration belonging to the daughter.—De La Pole v. Lindley, Wash., 204 Pac. 15.

43. **Poisons**—Prescriptions for.—An indictment charging that defendant, a duly registered physician, by means of three prescriptions sold to one, whom he knew to be a drug addict, at one time heroin, morphine, and cocaine equivalent to more than 3,000 ordinary doses, without directions or restrictions as to the use thereof by the addict, shows the sale was not within the exception to Anti-Narcotic Act Dec. 17, 1914, § 2, subd. "a" (Comp. St. § 6287h).—United States v. Behrman, U. S. S. C., 42 Sup. Ct. 303.

44. **Principal and Agent**—Owner's Remedy Against Agent.—Where the agent to sell an automobile received the full cash price therefor, the owners' remedy for the agent's failure to turn over such sum was against the agent.—Stevenson v. Maccallum-Donohue Finance Co., Wash., 204 Pac. 775.

45. **Public Utilities**—Jitney.—A jitney, the route of which parallels upon the same street the line of a street railway, is a public utility.—Public Service Ry. Co. v. Board of Public Utility Com'rs, N. J., 116 Atl. 274.

46. **Sales**—False Promise.—A seller's promise to furnish an experienced salesman to go with its agent, who purchased its goods for resale, to sell and demonstrate the use thereof, held merely a false promise, failure to carry out which does not of itself constitute fraud.—Security Sav. Bank v. Capp, Iowa, 186 N. W. 927.

47.——Breach of Contract.—In an action for breach of contract for the purchase of goods, the seller cannot recover as damages the amount paid for freight charges, cartage, and other expenses, which he was compelled to pay because of defendant's refusal to take the goods. —Diamond v. Brody, N. Y., 192 N. Y. S. 871.

48. **Seamen**—Mutual Release.—Where a seaman, who was left at an intermediate port because of illness, had signed a mutual release on discharge, required by Rev. St. § 4552, and by that section made a bar, but the lower courts found that he was only asked to sign for his wages, and that a dicharge was not mentioned, and that the master did not give him the certificate of discharge required by Rev. St. §4551, a decree allowing the seaman his wages, subsistence and medical attendance will be affirmed, especially in view of Act March 4, 1915, § 4, allowing a court on good cause shown to set aside such release.—Pacific Mail S. S. Co. v. Lucas, U. S. S. C., 42 Sup. Ct. 308.

49. **Street Railroads** — Rates. — Ordinances which were not contractual in form or in substance, and which declared in their preambles that the ordinances were for the purpose of "regulating and fixing the charges to be collected by" a street railroad, and which merely specified the rates to be charged by the railroad, held not contracts between the city and the street railroad, and did not preclude railroad from increasing rates, where rates so fixed were confiscatory.—City and County of Denver v. Stenger, U. S. C. C. A., 277 Fed. 865.

50.——Trespass.—In an action for the death of a trespasser against a street railway, the offer in evidence of General Ordinance of City of St. Louis, § 1052, making it a misdemeanor for any person to climb on, etc., a locomotive or train in the city, was properly refused; the ordinance applying only to steam railroads.—Finn v. United Rys. Co. of St. Louis, Mo., 237 S. W. 883.

51. **Taxation**—Public Lands.—Where the government has by final certificate parted with the equitable title to its public lands, and retains only the legal title by its delay in issuing the patent, the state can tax the equitable title of the entryman; but it cannot tax the entryman before the equitable title passes, except in the case of mining claims.—Irwin v. Webb, U. S. S. C., 42 Sup. Ct. 293.

52. **Telegraphs and Telephones** — Co-Operative Association.—The fact that a co-operative association maintaining a telephone system for the exclusive benefit of its members used the public highways for its lines does not establish that it is a public utility subject to the jurisdiction of the Utilities Commission.—People v. Orange County Farmers' & Merchants' Assn., Cal., 204 Pac. 873.

53. **Wills**—Undue Influence.—Where theory of contestants of will was that certain person had acquired a sinister power over the testatrix by reason of knowledge of testatrix of such person's improper intimacy with her sister, the court properly excluded, as being too remote, testimony to the effect that about 20 years before the execution of the will witness had seen such person and testatrix's sister together in a house when the other members of the family were away, and that witness had been sent out of the house to work in the barn.—Andrews v. Rhode Island Hospital Trust Co., R. I., 116 Atl. 193.

54. **Workmen's Compensation**—Arising Out of Employment.—Where an employee of an interborough railway company was furnished a pass entitling him to ride free to the place he began employment, the fact he was riding on such pass did not make an accident resulting in his death, which occurred before he reached the place where his employment began and before the time for which he was to be paid, one arising out of his employment within Workmen's Compensation Law, so that his representative could recover damages for his death in an action based on the theory he was a passenger.—Tallon v. Interborough Rapid Transit Co., N. Y., 134 N. E. 327.

55.——Course of Employment. — Where a workman, in an establishment in which it was the custom of the men to divert the use of air hose to sport during working hours, commenced the sport and while scuffling with a fellow workman holding a hose started to turn around and stumbled over a skid block, and in stumbling forward came within the range of the air, which entered his rectum, causing peritonitis, causing death, the death resulted from an "accident arising out of and in the course of his employment" caused by violent external means, within Workmen's Compensation Law, and not from the "deliberate intention of the workman himself," within section 6627, barring compensation for injury from such intention.—Stark v. State Industrial Acc. Commission, Ore., 204 Pac. 151.

56.——Course of Employment.—Where a mine top foreman was shot by another employee in a quarrel between them over a claim by the other employee that the foreman had unjustly docked him, and after the foreman had struck the other employee, the foreman was entitled to compensation, since his injury resulted from an accident in the course of his employment.—Taylor Coal Co. v. Industrial Commission, Ill., 134 N. E. 172.

57.——"During Hours of Service."—The words "during the hours of service" in Workmen's Compensation Act (Gen. St. 1913, § 8230i), providing for compensation for injuries to workmen injured "during the hours of service," include the period of reasonably prompt ingress and egress while still upon the immediate premises.—Lienau v. Northwestern Telephone Exch. Co., Minn., 186 N. W. 945.

58.——Delay in Notice.—Where the slipping of a barrel, which struck an employee's knee, caused a separation of the retina on September 9th, but the employee continued to work until September 18th, and did not know until the 21st that the retina was detached, and did not until later associate this injury with the slipping of the barrel, and a fellow employee was at work with him when the barrel slipped, and the employer's superintendent knew, shortly after the employee stopped work, that he had trouble with his eye that was caused in some way by his employment, delay in giving notice held not to have prejudiced insurer, within St. 1920, c. 223, § 1, now G. L. c. 152, § 44.—Sullivan's Case, Mass., 134 N. E. 393.

59.——Earning Capacity.—The presence of a pre-existing disease is not, of itself, sufficient to warrant a denial of compensation where such disease is shown not to have been of a character to disable the claimant, and, where the injury is shown to be a contributing cause of such disability, or such an aggravation of the disease as to result in such disability, compensation will be awarded.—Centralia Coal Co. v. Industrial Commission, Ill., 134 N. E. 174.

60.——Explosives.—The development of power in motor-truck engines by use of gasoline is not a "process" which brings the employment of one who drives a truck for a sales company engaged in distributing petroleum products within the section of the Workmen's Compensation Act, which embraces "all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on."—Dodson v. Kansas City Refining Sales Co., Kan., 204 Pac. 532.

61.——Independent Contractor — Apartment house manager held not an "independent contractor" liable under Compensation Act as employer of janitor—Fischer v. Industrial Commission, Ill., 134 N. E. 114.

62.——Loss of Thumb.—The loss of the use of a thumb cannot be considered the loss of a finger within Workmen's Compensation Law, § 15, subd. 3, providing that where injury results in the loss of more than one finger compensation therefor may be awarded for the proportionate loss of the use of the hand occasioned thereby.—Doris v. James Butler, Inc., N. Y., 192 N. Y. S. 515.

63.——Posthumous Child.—The compensation awarded to a posthumous child of a deceased employee does not begin before the birth of the child, and before that time the other dependents are entitled to share equally between them the maximum death compensation allowed by the Workmen's Compensation Law, though section 38 of that law defines child as including posthumous children.—Smith v. State Highway Commission, Ind., 134 N. E. 225.